

COVID-19 and the transformation of migration and mobility globally

COVID-19 and human rights of migrants: More protection for the benefit of all

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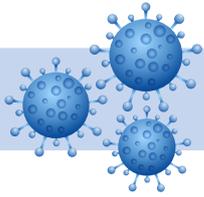
The spread of COVID-19 has brought with it an unprecedented array of challenges. As with many previous crises, the pandemic reveals the best and the worst of our societies. The impact of COVID-19 on the protection of migrants provides a telling example. When assessed from a policy and normative perspective, public health and human rights are not mutually exclusive. On the contrary, they can and must be reconciled within a sound and evidence-based approach. This paper advances three key lessons to better integrate health considerations and protection of migrants.

First, the moral panic triggered by the first wave of COVID-19 has highlighted the risk of creating a migration crisis within the health crisis. It produces new forms of vulnerabilities and exacerbates existing ones.

Second, the human rights of migrants as grounded in international law provide a flexible toolbox to address their need for protection while facing the current health emergency. Indeed, addressing the pandemic may require more or less rights, depending on the relevant legal norms and the factual circumstances.

Third, because COVID-19 is likely to become the new normal, integrating health and protection considerations is an opportunity to rethink immigration policies through innovative solutions in due respect to human rights. From this forward-looking perspective, fighting COVID-19 means more, rather than less, protection for migrants to mitigate the spread of the contagion.

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Mind the gap of protection: A crisis within the crisis

Like many other crises, the COVID-19 pandemic is disproportionately affecting people in vulnerable situations and marginalized communities. Migrants are no exception. The current health crisis exacerbates existing vulnerabilities of migrants, while generating new forms of vulnerability for them.

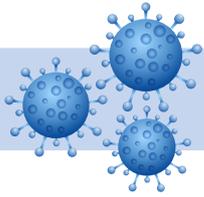
The impact of COVID-19 upon the vulnerabilities of migrants is well documented.² The most vivid instances include obstacles in accessing health care, denial of protection because of border closure, and the rise of racism, stigma and discrimination. Migrants who travel or live in unsafe conditions without access to water, sanitation and hygiene are obviously at greater risk. They include migrants in irregular situations, asylum seekers and exploited migrant workers. The risk is also particularly high for those who are detained in immigration centres or confined in camps with overcrowding, poor sanitation, and overstretched or inaccessible health services.

Addressing the vulnerabilities of migrants is not only a question of protection. It is also a matter of policy coherence and good governance. Neglecting the human rights of migrants is counterproductive and arguably dangerous in addressing the health crisis, for three obvious reasons:

- first, denying protection to migrants increases the risk of contagion within the whole population;
- second, it encourages irregular migration without any health control and follow-up;
- third, a large percentage of migrants are working in sectors considered essential to address the pandemic: health; agriculture; delivery services; transport; cleaning; and care for children, persons with disabilities and older persons.

Against this background, one of the most pressing issues is to avoid creating a migration crisis within the health crisis. In fact, when viewed from a distance, the current situation may be an opportunity to devise coherent and evidence-based policies grounded on rule of law with due respect for States' sovereignty. Addressing the current health emergency is not incompatible with the protection of migrants. On the contrary, the human rights of migrants under contemporary international law provide a common framework of analysis and a flexible tool for action in devising public health and migration policies in times of emergency.

2 Gagnon, 2020; IOM and UNHCR, 2020; McAuliffe and Bauloz, 2020; Norman, 2020; Sanchez and Achilli, 2020; Veizis, 2020.



Human rights of migrants in times of health emergency: More or less rights?

International human rights law is well equipped to face public emergencies with due regard to State sovereignty and the fundamental rights of individuals. From this perspective, the human rights of migrants in times of emergency are determined by three layers of legal norms: a core content of fundamental rights that applies in any circumstances; a derogation mechanism under some human rights conventions; and lawful restrictions to human rights.

The core content of human rights in times of emergency

Some fundamental principles of international law are applicable in any circumstances, including times of emergency. The right to life, freedom from torture, inhuman and degrading treatment, and the prohibition of forced labour and slavery are typical instances of fundamental rights that apply in any circumstances to every human being, including migrants, refugees and stateless persons.

Some other fundamental principles of international law are even more specific to migration. They include most notably:

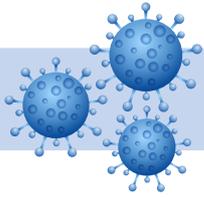
- (1) The principle of non-refoulement, when there is a real risk of torture, or inhuman or degrading treatment;
- (2) The prohibition of collective expulsion and the correlative right to an individual assessment;
- (3) The principle of non-discrimination;
- (4) The prohibition of racism and of incitement to national, racial or religious hatred.³

These core rights are minimum standards of humanity. As such, they are not negotiable and they prevail over any other considerations. As detailed elsewhere,⁴ these founding principles of international migration law have in common three main characteristics:

- they are legally binding for all States under customary international law and reinforced by a broad range of widely ratified conventions;
- they are absolute and cannot suffer from any exception nor derogation in any circumstances, including times of pandemic;
- they apply to all migrants regardless of their documentation status and regular situation.

³ Chetail, 2019:119–164.

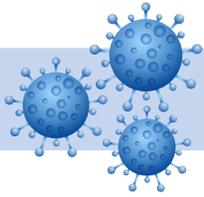
⁴ Ibid.

*The derogation mechanism under human rights law conventions*

The core content of migrants' rights under general international law is supplemented by a second layer of treaty norms related to the derogation mechanism provided by some – but not all – human rights conventions. In particularly exceptional circumstances, States may derogate from their conventional duties, provided the following six cumulative requirements are met:⁵

- (1) **Public emergency:** the use of derogation requires a “public emergency which threatens the life of the nation”, namely the threat of a widespread contagion within the whole population.
- (2) **Proclamation and notification:** the existence of such public emergency must be officially proclaimed and the State is additionally bound to notify the Secretariat of the relevant convention both of the derogatory measures and of its justifications to address the emergency.
- (3) **Necessity:** the derogation must be “strictly required by the exigencies of the situation” in order to protect public health and be limited in duration, coverage and scope.
- (4) **Proportionality:** the derogatory measures must be proportionate to the objective of protecting public health and be the least intrusive means to achieve this specific goal.
- (5) **Non-derogable rights:** some human rights cannot be subjected to any derogation. While the list of non-derogable rights varies slightly from one convention to another, it includes the following for State parties to the International Covenant on Civil and Political Rights (ICCPR):
 - right to life;
 - prohibition of torture or cruel, inhuman or degrading treatment, or of medical or scientific experimentation without consent;
 - prohibition of slavery and servitude;
 - recognition of everyone as a person before the law;
 - freedom of thought, conscience and religion;
 - prohibition of imprisonment because of inability to fulfil a contractual obligation;
 - principle of legality in the field of criminal law.

⁵ Article 4(1) ICCPR; Article 15(1) European Convention on Human Rights; Article 27(1) American Convention on Human Rights; Article 4(1) Arab Charter on Human Rights; Article 35(1) Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms. See also UNHRC, 2020.



(6) Compliance with other international obligations: derogations must be consistent with other legal duties under customary international law and treaty law. The former category of obligations includes the prohibition of discrimination, among other core human rights in times of emergency identified above. The latter encompasses all ratified treaties that do not provide a mechanism of derogation and, when such a possibility exists, includes those for which the State abstains from the use of derogation.

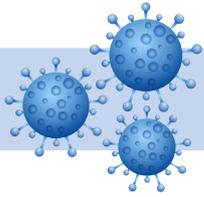
Contrary to the common belief, the great majority of conventions on human rights and migration do not provide a derogation mechanism. At the universal level, they include most notably:

- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Rights of the Child;
- Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;
- International Labour Organization (ILO) Migration for Employment Convention;
- ILO Migrant Workers (Supplementary Provisions) Convention;
- Protocol against the Smuggling of Migrants by Land, Sea and Air;
- Protocol to Prevent, Suppress and Punish Trafficking in Persons.

Each of these conventions remains plainly applicable in the context of the COVID-19 crisis. Obviously, this does not mean that States should implement them as if the pandemic had never happened. On the contrary, State parties are bound by these treaties to protect life and health within the scope of the relevant instruments. This primary duty and the measures to be adopted by States to address the pandemic are determined by the very content of the treaty provisions with due regard to the current circumstances.

The ICESCR offers a persuasive example. While economic, social and cultural rights may be subject to lawful restrictions in order to protect public health,⁶ a core content of subsistence rights (such as food, housing and clean water) is guaranteed in any circumstances to all individuals, including migrants, without regard to their

⁶ Article 4 ICESCR.



documentation status.⁷ As a result of this minimum core obligation, equal access to primary and emergency health care for all migrants remains utterly binding and in fact is needed more than ever to avoid the spread of contagions.⁸

Restrictions to human rights

As exemplified above, addressing the public health emergency may require more or less rights depending on the factual circumstances and the very content of the applicable legal norms. In most cases, States are able to attain their public health objectives by invoking the possibility of restricting certain rights.

The vast majority of human rights are not absolute and may be subject to lawful restrictions. Freedom of religion and the right of peaceful assembly are typical instances of relative rights. In the specific context of migration, they also include:

- the right to leave any country;
- the right to family life, as an obstacle to removal or a ground for family reunification;
- the right to liberty and the prohibition of arbitrary detention;
- the right to freedom of movement within the territory of a State.

Even in times of emergency, the possibility of restricting human rights is governed by several prerequisites. First, a restriction of a right must remain an exception. In other words, restrictions shall not impair the essence of the rights by reversing the relation between principle and exception.

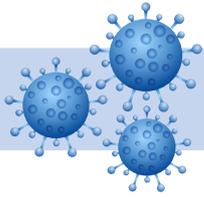
Second, to be lawful, a restriction must meet four cumulative conditions:

- (1) Legality:** the restriction is provided by law with clear and accessible legal grounds.
- (2) Necessity:** the restriction is necessary for the protection of one of four permissible grounds, which include public health, and designed to meet this specific objective.
- (3) Proportionality:** the restriction is proportionate to the protection of public health and constitutes the least intrusive means to achieve its legitimate purpose.
- (4) Compatibility with other rights:** the restriction is consistent with other human rights, including the principle of non-discrimination.⁹

⁷ CESCR, 2017, paras. 9–11; CESCR, 2020, paras. 9 and 12.

⁸ Ibid.

⁹ See notably Article 12(3) ICCPR and Article 4 ICESCR.



Against this background, the Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR make clear that restriction of human rights to protect public health “must be specifically aimed at preventing disease or injury or providing care for the sick and injured.” Hence, mitigating the spread of contagion may justify restriction to freedom of movement within the territory of a State. In other circumstances, however, restrictions are simply unable to protect public health. This objective may better be achieved in implementing human rights *in toto*. The prohibition of arbitrary detention offers an obvious case. The duty to provide non-custodial alternatives is further required to avoid the contagion spreading in overcrowded immigration detention centres.

Human rights at the borders: From legal commitments to recommended actions

Although the future spread of contagion and its impact on mobility are hardly predictable, COVID-19 may be an opportunity to restate and reinforce a sound, coherent and human rights-based approach to migration policies alongside public health objectives. Clearly, States enjoy a broad margin of discretion in adapting their response to the changing evolution of the pandemic. Under international law, however, a key distinction shall be drawn between what States must do and what they should do, in order to reconcile public health with the protection of migrants.

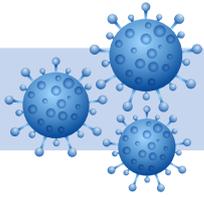
The normative framework at the borders: What States must do

States are legally committed to protect both public health and human rights in managing their borders. The challenges, be they political, humanitarian or operational, are huge and manifold. From a more general angle, the two basic options at play are border closure or stricter immigration control. The ultimate choice is up to each sovereign State with due regard to the evolution of the pandemic.

Nonetheless, both policy and normative considerations are more in favour of the latter option than the former. Reconciling health and protection imperatives is achieved in a more inclusive and predictable way within stricter immigration control. Alternatively, border closure does not operate in a legal vacuum and must be weighed against the risk of creating another public health hazard (i.e. by increasing irregular migration without any health control).

In any event, the twofold duty to protect public health and human rights can still be reconciled under each scenario:

- (1) First scenario: in some exceptional circumstances, States may temporarily close their borders as a measure of last resort to prevent contagion from outside.



Even in such an extreme case, border closure cannot justify any deviation from the most fundamental human rights in times of public emergency. It must thus allow exceptions with due regard to the principle of non-refoulement, the prohibition of collective expulsion, the right to an individual assessment, and the principle of non-discrimination. Other specific measures of adaptation are further required regarding the application of conventions that do not allow any derogation, including the Convention on the Rights of the Child.

- (2) Second scenario: in most cases, States may establish stricter immigration control with due regard to health and protection imperatives.

The pandemic obviously requires health-screening measures at the borders and, when needed, systematic quarantine. Health considerations may also justify a refusal of entry, provided it is necessary and proportionate to the protection of public health. A denial of entry is generally considered proportionate if it is based on a medical assessment and there is no other means to achieve the public health objective (such as community-based and home quarantine).

Besides the absolute guarantees in times of emergency already mentioned, some human rights may be subjected to lawful restrictions with a view of preventing contagion (such as freedom of movement), whereas other rights must be fully applied to achieve the same public health objective. They include the duty to provide alternatives to detention and access to health care and basic services for all migrants.

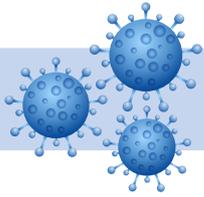
Recommended actions at the borders: What States should do

Integrating health and protection considerations at the borders requires much more than implementing the current normative framework. It should go beyond the black letter of international law through proactive and innovative solutions. Taking seriously both public health and protection means more, rather than less, rights for migrants, because protecting persons on the move is protecting everyone.

Following this stance, many United Nations stakeholders have adopted non-binding recommendations to increase the protection of migrants, with the view of mitigating the impact of COVID-19. An archetypal instance is provided by the United Nations Network on Migration and its call to suspend forced returns of migrants during the pandemic.¹⁰ The network has also detailed a comprehensive range of recommended actions to enhance access to basic services for all migrants, regardless of their documentation status.¹¹

¹⁰ UN Network on Migration, 2020a.

¹¹ UN Network on Migration, 2020b.



Among other similar initiatives,¹² the International Organization for Migration (IOM) has identified several non-binding recommendations, with the view of merging immigration and health imperatives. They include:

- (1) Facilitating immigration and visa procedures for health-care workers and essential personnel responding to the pandemic and people with priority travel needs (including family members, frontier workers, transport personnel, passengers in transit and those travelling for imperative health or family reasons);
- (2) Expanding remote consular and/or processing support, to ensure the continuation of seasonal or temporary work and enhanced access to lawful pathways through facilitated immigration and visa procedures;
- (3) Facilitating regular stay of visa holders (through automatic extension or online applications for extension);
- (4) Waiving administrative sanctions or penalties on foreigners unable to leave the territory due to travel restrictions;
- (5) Regularizing undocumented migrants to enable their access to social and health services.¹³

While these non-binding recommendations are not exhaustive, several United Nations Member States have taken similar actions alongside other innovative solutions, such as mobility corridors and immunity passports.¹⁴ Further systematic integration of health and protection imperatives at the borders entails a broad range of quick and flexible adaptations of both legal and operational measures.

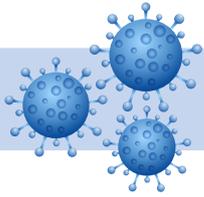
Critically, addressing the manifold challenges of COVID-19 will require a rethink of migration policies so that they can be responsive to the evolution of the pandemic, while maintaining consistent adherence to human rights law. It further needs a truly collective response through enhanced international cooperation, for no State can fight the virus alone. As the United Nations Secretary-General underlines, “No-one is safe until everyone is safe. [...] This crisis is an opportunity to reimagine human mobility for the benefit of all while advancing our central commitment of the 2030 Agenda to leave no one behind.”¹⁵

¹² ILO, 2020; OHCHR, 2020.

¹³ IOM, 2020a.

¹⁴ Ibid.; United Nations, 2020:20.

¹⁵ United Nations, 2020:24.



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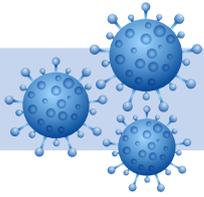
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